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**U.S. Citizenship
and Immigration
Services**

B6

MAR 29 2004

FILE: LIN 02 001 55510 Office: NEBRASKA SERVICE CENTER Date:


IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a dress designer. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, the owner of the petitioning business submits additional evidence and asserts that the ability to pay the proffered wage has been demonstrated.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon whether the petitioner's ability to pay the wage offered has been established as of the petition's priority date. The priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's priority date is January 24, 2000. The beneficiary's salary as stated on the labor certification is \$17.50 per hour or \$36,400 annually. The petitioner is organized as a sole proprietorship. The Immigrant Petition for Alien Worker (I-140) indicates that it has seven employees.

In this case, the petitioner's owner initially submitted a copy of a December 31, 2001, bank statement showing a balance of \$6,367.13 as evidence of the ability to pay the proffered wage. She also provided copies of her Form 1040, U.S. Individual Income Tax Return for the years 1999 and 2000 including Schedule C, Profit or Loss From Business. The sole proprietor filed jointly with her spouse and claimed one dependent on each of the tax returns. They contain the following information:

Year	Gross Receipts	Business Income	Adjusted Gross Income
1999	\$253,996	\$40,893	\$53,365
2000	\$267,979	\$44,239	\$61,696

On February 14, 2002, the director advised the petitioner that the evidence was not sufficient to warrant favorable consideration of her petition. Because the petitioner is a sole proprietorship, the director advised the petitioner's owner to submit a summary of her monthly living expenses, as well as further proof supporting the existence of her manufacturing business. In response, the petitioner's owner submitted copies of her municipal business license, a business card, and various photographs of her finished products. The owner also provided a summary of her living expenses, which totaled \$3,440 per month, annualized to \$41,280.

Pursuant to the regulatory requirements of 8 C.F.R. § 204.5(g)(2), the petitioner must show its continuing ability to pay the offered wage as of the visa priority date. A sole proprietorship is not legally separate from its owner. Therefore, a determination of the petitioner's ability to pay the proffered wage includes a consideration of all the income and expenses generated by the sole proprietor and her dependents. She must be able to establish that she can meet her existing business expenses and pay the proffered wage. She must also show that she can sustain herself and her dependents.

The record in this case indicates that in order to cover her annual reasonable living expenses of \$41,280, as well as pay the beneficiary's proffered wage of \$36,400, the sole proprietor must have \$77,680 available to her. Her 2000 individual tax return, which covers the visa priority date of January 24, 2000, reflects that her declared adjusted gross income of \$61,696 is \$15,984 less of than the required amount. It is noted that in *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982) *aff'd*, 703 F. 2d 571 (7th Cir. 1983), the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than 20,000 where the beneficiary's proposed salary was \$6,000 or about 30% of the petitioner's gross income. In this case, it is also noted that even without considering the sole proprietor's living expenses, the beneficiary's wage represented 59% of her adjusted gross income in the year 2000.

On appeal, the sole proprietor provides a copy of an August 30, 2002, bank statement indicating that the balance in the petitioner's account is \$6,906.91. The selected bank statements contained in the record provide only a snapshot of the petitioner's ability to pay the proffered wage at a given date, do not reflect other existing expenses or encumbrances, and do not establish a sustainable source out of which the proffered wage could be paid. Similarly, the petitioning owner's opinion that the beneficiary will prospectively generate additional revenue for the business does not include a consideration of additional expenses and does not establish eligibility as of the visa priority date. As stated in *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Act. Reg. Comm. 1977), the petitioner "cannot expect to establish a priority date for visa issuance for the beneficiary when at the time of making the job offer and the filing of the petition with [CIS] he could not, in all reality, pay the salary as stated in the job offer."

In view of the foregoing, and based on a review of the financial documentation contained in the record, the AAO cannot conclude that the petitioner has demonstrated a continuing financial ability to pay the proffered wage, pursuant to the requirements set forth in 8 C.F.R. § 204.5(g)(2).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.